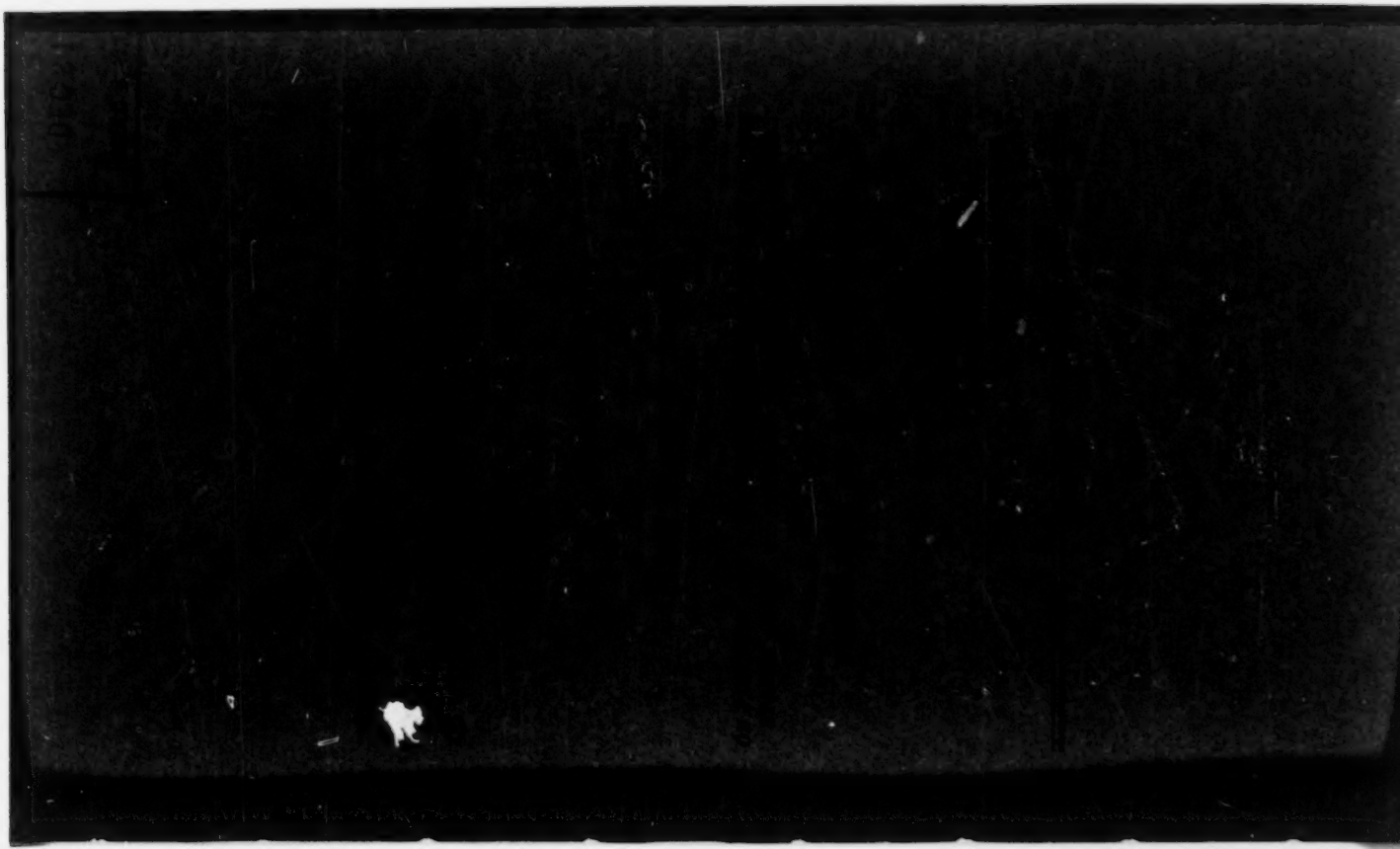


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369777—55 ---1

# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 457

B. B. CARTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

### OPINIONS BELOW

Neither the opinion of the District Court (Pet. App. 1a–9a; R. 519–529) nor the *per curiam* opinion of the Court of Appeals (Pet App. 10a–12a) has been reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1955. (Pet. App. 13a.) A petition for rehearing was denied on August 12, 1955. (Pet. App. 13a.) On September 6, 1955, the time for filing a petition was extended by Mr. Justice Clark to October 10, 1955, on which day the petition was filed. The jurisdiction of this

Court is invoked under 28 U. S. C., Section 1254 (1).

## QUESTION PRESENTED

Petitioner entered a plea of guilty to an information charging him with wilful attempts to evade income taxes. He was fined $10,000, but no sentence of imprisonment was imposed. Over three years later he asked leave to withdraw the plea. The question is whether the district court was required to set aside the conviction and permit petitioner to withdraw his plea of guilty.

## STATUTES AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 32. *Sentence and Judgment.*

* * * * *

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * * *

**STATEMENT**

On January 17, 1951, an information in six counts was filed against petitioner in the District Court for the Northern District of Texas charging him with wilful attempts to evade his own and his wife's income taxes for the years 1944, 1946 and 1947, in violation of Section 145 (b) of the Internal Revenue Code of 1939.[1] The amounts of income and the taxes due thereon, as reported and as corrected, were alleged to be as follows (R. 1–7):

| | Reported | | Corrected | |
|---|---|---|---|---|
| | Income | Tax | Income | Tax |
| 1944 (husband) | $2,143.18 | $227.00 | $20,202.26 | $7,141.47 |
| 1944 (wife) | 2,143.17 | 227.00 | 20,202.25 | 7,141.47 |
| 1946 (husband) | 11,971.16 | 2,858.59 | 23,381.00 | 8,130.38 |
| 1946 (wife) | 11,971.16 | 2,858.59 | 23,380.99 | 8,130.38 |
| 1947 (husband) | 21,556.98 | 7,174.67 | 27,374.97 | 10,327.35 |
| 1947 (wife) | 21,556.98 | 7,174.67 | 27,374.96 | 10,327.35 |

[1] The date of the information is mistakenly given as January 17, 1954 on page 1 of the record.

On the day the information was filed petitioner appeared in court with counsel, waived indictment (R. 7–10), pleaded guilty (R. 11), and, after the court had heard statements from the prosecutor, defense counsel and petitioner himself (R. 11–27), was fined $10,000 (R. 27–30). The fine was paid the same day (R. 110).

Over three years later, in April 1954, petitioner filed a motion to be allowed to withdraw his plea of guilty, alleging that he had never intentionally evaded the payment of taxes, that his waiver of indictment and plea of guilty had been induced by misrepresentations on the part of his own counsel and the United States Attorney,[2] and that, when he entered the plea of guilty, he denied that he had acted either intentionally or wilfully (R. 30–58). After a hearing lasting four days (R. 66, 448, 537), and after consideration of briefs filed by counsel (R. 519, 537–545), the district judge denied the motion (R. 519–529), finding that petitioner understood what he was doing when he entered his plea of guilty (Pet. 8a). The Court of Appeals, finding no proof of manifest injustice requiring withdrawal of the guilty plea, unanimously affirmed. (Pet. 10a–12a).

The Government's evidence may be summarized as follows:

*Petitioner's returns.* Petitioner, who had been

[2] Counsel for petitioner stipulated at the hearing that there was no misconduct whatsoever on the part of the prosecutor. (R. 446–448.)

a poor tenant farmer, suddenly began to be very prosperous about 1940. Since he had never previously filed an income tax return and since his education was elementary, his banker, L. M. Price, recommended that he consult an accountant-attorney, W. G. Russell, whose office thereafter prepared returns each year, up to and including 1950, by assembling the pertinent information from bank statements and cancelled checks brought in by petitioner. (R. 68–73, 312–319.) After the returns for 1941, 1942 and 1943 had reported net taxable income of $12,700, $38,700 and $29,000, respectively, Russell became suspicious when the first draft of the 1944 return disclosed a net loss, despite the fact that petitioner had harvested an exceptional crop that year, and close questioning of petitioner by Russell ultimately resulted in the return of a profit of about $4,000. (R. 318–321, 415–416.) The comparatively small size of petitioner's income tax check, however, excited the interest of a bank employee, and Price warned Russell that something must be wrong. (R. 321–322.) In addition, there were numerous rumors in the community, relayed to Russell by Price, that petitioner had not been reporting all his income, and petitioner apparently openly boasted that he had not. (R. 205–207, 215–216, 230–231, 259, 323–324.) In preparing the returns for 1945 and 1946, Russell advised petitioner of the rumors, warned him that he must report all his

income, repeatedly asked whether there was other income which did not show up in the bank statements and cancelled checks, and was assured by petitioner that all of his income was run through his bank account.[3] (R. 323–325, 334, 372, 381.) Petitioner complained to the bank about permitting information to leak out as to the size of his income tax payments. (R. 306.)

Petitioner admittedly received large amounts of income during the three prosecution years which he did not deposit in his bank account, and which did not, therefore, come to the attention of Russell's office for inclusion in the returns. In some instances firms to which petitioner had sold cattle or grain were instructed by petitioner to make out checks in the name of third parties from whom petitioner was purchasing land. In other instances a portion of the proceeds of a check received by petitioner from the sale of cattle or grain would be applied in payment of his bank loan and only the remaining portion would be entered on a deposit slip and run through his account. This unorthodox banking procedure was adopted on petitioner's specific instructions. (R. 230–231, 236, 263–264, 328–329, 417–425.)

*The investigation.* Sometime in late 1946 or early 1947, Russell, allegedly alarmed by the continual rumors, called them to the attention of a revenue

[3] Russell's questioning elicited the fact that one item of $92,000 had not been put through the bank, and this was then included in the 1946 return. (R. 324–325.)

agent. (R. 252–255, 325–328, 332, 381–382.) An investigation was begun in July 1947; petitioner was questioned; evidence of criminal fraud was discovered; and a special agent was assigned to investigate the case in August. (R. 74, 185, 255–268.) About the same time Russell, also, finally learned definitely that petitioner had not been reporting all his income. He immediately advised petitioner, recommended the filing of amended returns, and, in an effort to forestall criminal proceedings, notified the agent who had begun the investigation that corrected returns would be filed. However, when Russell learned that a special agent had been assigned to the case, he said he warned petitioner that prosecution and a prison sentence were possible, and that the filing of amended returns should be abandoned since it might constitute an admission of guilt. (R. 267–268, 328–330, 337–338, 368, 370.) During the ensuing investigation a statement was taken from petitioner in September 1948, at which time he was advised of his privilege not to answer any question that might tend to incriminate him. (R. 77–78, 151.)

In January 1949 the confidential investigative report of the revenue agents, including the original income tax returns, was, by error, mailed to petitioner. The report stated that the investigation had been initiated by information furnished by Russell, and it concluded by recom-

mending criminal prosecution. (R. 81, 87, 136, 147.) When petitioner confronted Russell with the report, Russell admitted that he had called the rumors to the attention of the agents and said he pointed out that he had previously mentioned to petitioner both the rumors and the fact that he had discussed them with the agents. (R. 333–335, 364.) The report was gone over in detail; petitioner's attention was called to the recommended criminal proceedings; and the advisability of hiring counsel was discussed. According to Russell, petitioner wanted to destroy the report in the belief that the Government could not convict him without the original returns, but Russell warned him that the report was Government property and advised that it be retained until called for. (R. 335–337.)

In November 1949 petitioner was informed by the Treasury Department that prosecution had been recommended. (R. 338–339.) He again discussed the problem of counsel with Russell, and suggested that Russell represent him. Russell, however, suggested his associate, Arthur Glover, and the latter, after some preliminary investigation, agreed to take the case. From that point Glover made all decisions, although Russell was kept informed and shared the fee.[4] (R. 339–342, 364–365, 393–394, 387–394, 437.)

[4] Russell was not a trial attorney. (R. 438.) Glover, although still an employee of Russell at the time he entered the case, was already in the process of becoming a partner in Russell's law firm. (R. 461–463.)

*The proposed defense.* Having concluded that the fact of substantial amounts of unreported income was indisputable,[5] Glover endeavored to build his defense on lack of intent, and attempted to show that the omissions were the result of petitioner's ignorance and carelessness, the bank's unorthodox methods of recording his deposits, and improper preparation of the returns by Russell's accounting employees. (R. 398–401, 405, 407.) Petitioner was fully aware that this was the proposed defense, understood that the prosecution had a heavy burden of proof to establish that his omissions were willful, assisted Glover in preparing a written summary of this defense, and complimented him on the finished product. (R. 132, 392–393, 399–400, 404, 408.) Glover presented this argument and the written summary, unsuccessfully, in four or five conferences with the Treasury Department, the Department of Justice and the United States Attorney. (R. 391, 404–405, 407–408, 410–413.) The longer Glover worked on the case, however, the more, said he, he became convinced of the inherent weakness of the defense of lack of willfulness. (R. 401–403, 414–425.) There were many items for which petitioner could give him no satisfactory explana-

[5] Glover did not learn of petitioner's possession of the confidential report until about two months after he had been called into the case. (R. 395–397.)

tion (R. 401–402, 420–421), and he was aware that there was at least one witness who might testify as to petitioner's boasts (R. 206–207, 419–420, 423, 472–473). Furthermore, despite the fact that the Government did not have the original tax returns, he was aware that Russell, who had acted only as an accountant in preparing the returns, could be subpoenaed to produce the retained copies. (R. 403–404.) He also discovered that petitioner had failed to report some income for the year 1947 when he was well aware that the investigation was in progress. (R. 417.) After having been informed by the United States Attorney that the case would be presented to a grand jury, and having finally become convinced both that petitioner was guilty and that a jury would convict him, Glover asked the United States Attorney what sentence might be imposed if petitioner entered a plea of guilty, and was informed that Judge Davidson usually disposed of such cases with a fine only. (R. 411–412, 414.)

On January 10, 1951, Glover discussed the matter at length with petitioner and his wife, said he explained the weakness of petitioner's case, warned that conviction and imprisonment were highly probable, and advised that petitioner would probably escape with a fine by pleading guilty and that he could avoid a great deal of publicity by waiving indictment and pleading to an information. Petitioner did not admit that

he had intentionally failed to report income, but the next morning he informed Glover that he had decided to waive indictment and plead guilty. Glover advised him to obtain at least two character witnesses to appear for him at the time of sentencing. (R. 425–430.)

*The plea and sentence.* On January 17, 1951, petitioner, Glover and Russell went to the United States Attorney's office where they were furnished with copies of the waiver of indictment and the information, both of which Glover and Russell carefully went over with petitioner. The prosecutor then explained the procedure to be followed in court. (R. 346–347, 430–432.) Subsequently petitioner stated in open court that he understood his right to indictment; he then signed the waiver, and, after hearing the information read, entered his plea of guilty. (R. 8–11.)

The court then proceeded to consider the circumstances of the admitted offenses in order to determine the sentence to be imposed. The prosecutor read a summary of the Government's evidence (R. 12–17, 275); Glover made a plea for leniency (R. 17–19); and the two character witnesses testified (R. 20–23). The court then asked whether petitioner desired to say anything in his own behalf "by way of mitigation or explanation." (R. 23.) Petitioner admitted that he had failed to report income, but he said that he

"just forgot to turn it in." The court said (R. 24–25):

> I will state it to you in a different form. The Court never wants any man to plead guilty unless he feels himself to be guilty, and if you feel yourself to be innocent, then we think you should be tried, and tried by a jury.
>
> The DEFENDANT:
>
> I think I am guilty through neglect of my business, Judge, that is the only reason I am pleading guilty.
>
> The COURT:
>
> You mean to say you are not willfully guilty, and did not intentionally break the law?
>
> The DEFENDANT:
>
> No, sir, I did not intentionally do it, no, sir.

In response to this statement, the court, after expressing its sympathy for one who had come up the hard way, as had petitioner, stated (R. 26):

> Getting down to the particular facts of your case, a man can sometimes justify himself in his mind, when he may not be justified in law. You may feel like, during the early years of your life when living was hard and the depression was on, that you made no money, and what little you made, you lost it pretty soon and then, when the good years came along, that you were entitled to acute [*sic*] something. There is some justification in that, but

you cannot break the law, in order to do it.

When you do, then you have to confront the Court, just like the rest of the men.

After noting that petitioner had evaded taxes on about $60,000 in income by using current receipts to purchase assets without running the receipts through the bank account which was used as the basis for his income tax returns (R. 26), the court said (R. 27):

It looks like you did that intentionally. By the time though that you get your delinquent tax all paid, you are going to be left almost a poor man again. The Court does not quite find it in his heart to send you to the penitentiary, yet, the circumstances justify a considerable punishment by the way of a large fine. When we assess this fine, we wouldn't want any trouble about the collection.

What is your financial situation at this time? Are you able to pay a good fine?

The DEFENDANT:

I went to my bank yesterday morning, Judge, I have got around four thousand dollars in the bank, between four, and forty-five hundred.

The court then asked whether petitioner could pay a fine of $10,000; petitioner assured the court that he could; sentence was imposed; and the fine was paid the same day (R. 27–30, 433.)

Petitioner was "very happy" after the sentencing. (R. 354, 433.) Glover continued to repre-

sent him in various legal matters for several months, and effected an agreement as to the amount of petitioner's civil tax liability. (R. 354–355, 438–441.) In the following August, however, petitioner, apparently in the hope of reducing this civil liability, transferred his file to another tax attorney named Singleton. (R. 125, 127, 159–162.)

*Petitioner's testimony.* The foregoing is the Government's version. Petitioner's statement of the facts (Pet. 5–13) relies chiefly upon his own testimony at the hearing on the motion to withdraw the plea of guilty, and that testimony was in sharp conflict with the testimony of Government witnesses on many points. Petitioner, for example, denied that he had ever given instructions to the bank not to enter on his deposit slips those portions of his cattle and grain checks used to pay off his bank loans (R. 72–73); he stated that when he first learned of the investigation in July 1947 he directed Russell to prepare amended returns and denied that he had ever been told why Russell did not do so (R. 75–76); he denied that he had ever been informed that he was being investigated for fraud until he received the agents' confidential report in January 1949 (R. 77); he stated that Russell, when confronted with the reference to his contact with the agents at the outset of the investigation, said that the agents were liars and advised him to make copies of the report and then burn the original (R. 81–82); he denied that he had ever heard that a criminal

prosecution was possible until about two months before he pleaded guilty[6] (R. 113–115, 135); he denied that anyone had ever explained to him, prior to the entry of the plea, that the Government had to prove that he had "wilfully" evaded his taxes (R. 103–104); he denied that he had been told that he would be required to waive indictment (R. 105, 116); he denied that he had been told he would have to appear in court (R. 116); and he denied that Glover and Russell had gone over the information with him before entering the court room on the morning of the plea (R. 157). He admitted that he had decided to enter a plea of guilty because of Glover's warning that he would probably go to the penitentiary if he did not. (R. 103, 123, 170.) He offered no satisfactory explanation of the fact that he had directed purchasers of grain and cattle to draw checks payable to third parties from whom he was buying land.

DISCUSSION

Rule 32 (d) of the Federal Rules of Criminal Procedure (*supra*, p. 3) provides that a motion to withdraw a plea of guilty "may be made only before sentence is imposed * * *; but *to correct manifest injustice* the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." (Emphasis

[6] He admitted, however, that in January 1949 he had received and studied the confidential report which concluded with a recommendation of prosecution. (R. 81, 136–137.)

added.) It is settled that a motion under the Rule is addressed to the discretion of the court, and that the movant bears the burden of showing "manifest injustice."[7]

The lower courts treated this as a case in which a defendant had entered a plea of guilty valid on its face. If the record could fairly be read as showing such a plea the Government would contend, in opposition to certiorari, that petitioner failed to sustain the burden of showing manifest injustice.

The Government, however, is constrained to confess error because, in our view, the record on its face does not show an unqualified plea of guilty. What the record does show is that, in response to specific questions of the trial judge seeking to elicit petitioner's understanding of the meaning and significance of his plea, petitioner stated: "I think I am guilty only through neglect of my business, Judge, that is the only reason I am pleading guilty. * * * I did not intentionally do it." (R. 25.)[8]

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[7] *Kercheval* v. *United States*, 274 U. S. 220, 224; *United States* v. *Panebianco*, 208 F. 2d 238 (C. A. 2), certiorari denied, 347 U. S. 913; *Friedman* v. *United States*, 200 F. 2d 690, 696 (C. A. 8), certiorari denied, 345 U. S. 926; *United States* v. *Shneer*, 194 F. 2d 598, 600 (C. A. 3); *Williams* v. *United States*, 192 F. 2d 39, 40 (C. A. 5).

[8] Earlier in the colloquy with the trial court, petitioner stated (R. 23):

"Judge, I haven't denied any time owing this tax to these boys, and I didn't know at the time my tax was turned in that I owed it, then. I just forgot to turn it

The offense to which petitioner was pleading guilty, *i. e.,* violation of 18 U. S. C. 145 (b), includes wilfulness as an essential element. *Spies* v. *United States,* 317 U. S. 492. If, as he insisted to the trial judge, petitioner was "guilty" only through "neglect" and "did not intentionally break the law", he was, in substance, pleading "not guilty". The trial judge himself had told petitioner earlier in the colloquy (R. 24–25), "if you feel yourself to be innocent, then we think you should be tried, and tried by a jury." It was in response to this invitation that petitioner offered his amplifying and qualifying expressions of innocent intent.

As we read the record, it permits no conclusion other than that petitioner's explicit disavowal of an essential element of the offense contradicted his plea of guilty. This disavowal was never withdrawn. It necessarily constituted a substantial qualification, if not a revocation, of the plea. Thus, although the plea of guilty was expressly negatived by petitioner's unretracted protestations of innocence, the plea was treated as one of guilt and a judgment of conviction entered.

The Government believes it important in the administration of criminal justice that pleas of guilty, which substitute for evidence, shall be genuine and unequivocal. Where a plea is coupled with clear assertions by the defendant of his in-

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in. I didn't keep any books, and I didn't know anything about it, that is all I have got to say about it."

nocence, it is error to base upon it a judgment of conviction, for it is in substance a plea of not guilty. In such a case, we believe, it is the duty of the trial court to direct entry of a plea of not guilty and order the defendant to stand trial. At the very least, the court should undertake to explore more fully the defendant's understanding of his position. Unless thereafter the defendant withdraws his earlier statements inconsistent with guilt and unqualifiedly pleads guilty, the plea of guilty cannot properly be accepted and be made the basis of a judgment of conviction.[9]

Further, in the instant case, the error in accepting petitioner's plea is aggravated by extraordinary facts surrounding his representation by counsel. One of his two lawyers, Russell, had helped prepare the tax returns. Later he furnished the Government with information leading to the prosecution. The other lawyer, Glover, who appeared for petitioner in the district court, was Russell's partner. These circumstances generate a serious doubt, not satisfactorily resolved by the record, as to whether the legal advice on which

[9] See Rule 11 of the Federal Rules of Criminal Procedure:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. * * *

petitioner acted may not have been affected by an interest adverse to his own.

The only remaining question is whether, in view of the finding of the district court, on the motion to withdraw the plea (Pet. 8a), that petitioner understood "just what he was doing" when he entered it, he should be held bound because there would be no "manifest injustice" to him. Both courts below were apparently impressed by the fact that petitioner was then seeking, not merely to withdraw his plea and stand trial, but to escape prosecution altogether by repudiating his waiver of indictment. In this Court, however, petitioner expresses a readiness to stand trial on the offenses alleged in the information, and explicitly asserts that he stands by his waiver of indictment. He states unequivocally in the petition for certiorari (p. 18) that his "sole purpose is to withdraw his plea of guilty and enter a plea of not guilty to the information which was timely instituted against him and stand trial on the offenses charged therein." Thus, there is eliminated a factor which might otherwise weigh against permitting withdrawal of the plea.

The view the Government takes of the facts of this case results in no impairment whatsoever of the salutary rule that where a defendant has entered what is genuinely a plea of guilty and thereafter, after sentence, moves to withdraw the

plea, such a motion, addressed to the discretion of the court, is to be granted only if the defendant sustains the burden of showing that it is required to correct manifest injustice. This case, we believe, does not fall within the rule. Here the record discloses no initially valid plea of guilty. On its face, the plea entered by petitioner was, if regard be had to the substance of his words, a plea of not guilty. Hence a proper foundation for the judgment of conviction was entirely lacking.

### CONCLUSION

For the reasons stated, the Government believes that, in view of the unusual circumstances presented, the ends of justice would best be served by a remand of this case to the district court to allow withdrawal of the plea of guilty and to permit petitioner to plead anew to the information.

Respectfully submitted,

SIMON E. SOBELOFF,
*Solicitor General.*

DECEMBER 1955.

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